STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KEYWAN MARCEL CLARK,

Defendant-Appellant.

UNPUBLISHED
September 11, 2003

No. 239732
Oakland Circuit Court
LC No. 2001-179427-FH

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of two counts of possession of a controlled substance, MCL 333.7403(2)(a)(B)(v), one count of felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. The effective assistance of counsel during trial is questioned on appeal. Defendant's challenge concerns a perceived hearsay objection and the failure to call a witness. The challenges fail and we affirm.

On May 22, 2001, officers from the Pontiac Police Department executed a search warrant at an apartment located within the city. Upon entering the apartment, the police encountered a female acquaintance of defendant's. Defendant was not in the apartment at the time. The officers recovered various quantities of heroin and cocaine from the apartment. They also recovered numerous items commonly used in the packaging of illicit narcotics, a shotgun, an apartment rental agreement with defendant's name on it, and $1,818 found in a safe. Police also searched a green Pontiac Sunfire, recovering certain quantities of heroin and cocaine, a revolver, defendant's state identification card, and a letter from the Family Independence Agency with defendant's name on it.

During the course of the search, defendant arrived at the apartment complex and was promptly apprehended. Police confiscated a cell phone and a set of keys from defendant's person. Later, the cell phone rang and one of the officers answered it. At trial, the officer testified that the caller asked for "Keys," requested "six of them," and asked to meet "at Studio X." The officer opined that the phrase "six of them" was a request for a specific quantity of narcotics. The officer also testified that Studio X is an apartment building in Pontiac that has a reputation for being a center of drug activity.

Defendant's sole argument on appeal is that he received ineffective assistance of trial counsel. Specifically, defendant asserts that counsel was ineffective for failing to raise a hearsay objection to the officer's testimony regarding the cell phone conversation, and for failing to call as a witness the woman found in the apartment at the time of the search.

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. The right to counsel is the right to effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To succeed on a claim of ineffective assistance, defendant must satisfy a two-pronged test. First, defendant must show that counsel's performance fell below an objective standard of reasonableness. *Strickland, supra*, 466 US at 686; *Pickens, supra*, 446 Mich at 309. And, defendant must prove the unreasonable conduct was prejudicial, i.e., "that but for counsel's error there is a reasonable probability that the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable." *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Defendant must overcome a strong presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant argues that the officer's testimony was hearsay because the unidentified person to whom he was speaking on the cell phone was not available for cross-examination. Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." MRE 801(c). We do not believe that the statements regarding wanting "six of them" and meeting at "Studio X" are assertions. Rather, they are imperative utterances and do not make evaluative assertions about facts and events. See *People v Jones (On Reh After Remand)*, 228 Mich App 191, 204-205; 579 NW2d 82 (1998), modified on other grounds 458 Mich 862 (1998).

Further, there is no indication that the utterances were offered at trial for the truth of the matters asserted. In *State v Collins*, 76 Wash App 496; 886 P2d 243 (1995), the court reviewed similar issues and statements implicating the hearsay objection. *Collins* involved two callers, one whom "stated he or she wanted to pick up something and the other [whom] stated she needed a half." *Id.* at 499. The *Collins* court held that a law enforcement officer's testimony about these statements did not constitute hearsay because the truth of the callers' statements were not at issue. *Id.* Similarly in the case at bar, there is no evidence that the truth of the caller's utterances regarding wanting "six of them" and to meet "at Studio X" was at issue.

Defendant argues, however, that the testimony was used to associate defendant with drug trafficking by creating an implied assertion. While the Michigan's Rules of Evidence do not expressly state that implied assertions are excluded from hearsay, this Court addressed the issue in *Jones, supra*, 228 Mich App at 207:

> While a number of decisions over the years have regarded "implied" assertions as hearsay, we believe that the theory had a questionable origin, that it has never achieved general recognition in decided cases, that is expressly negated by the modern rules of evidence, and that it is contrary to Michigan precedent.

Because counsel is not required to raise a meritless objection, counsel's failure to raise a hearsay objection to this testimony was not objectively unreasonable, and therefore does not evidence ineffective assistance. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant also argues that counsel was ineffective for failing to compel defendant's female acquaintance to testify because she could have provided relevant testimony about defendant's alleged connection with the apartment when the search warrant was executed. It is well established that a trial counsel's decisions on the witnesses to be called and the evidence to be presented are matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). There are a number of legitimate reasons why defense counsel would not attempt to compel the woman to testify, including the fear that defendant's position would be harmed if she invoked her Fifth Amendment rights in front of the jury. "Both Federal and state courts have recognized the potential prejudice that results when a witness is placed on the stand and invokes the Fifth Amendment." *People v Poma*, 96 Mich App 726, 730; 294 NW2d 221 (1980). And, there was no dispute at trial that the woman had a Fifth Amendment right not to testify.

Relying on *Poma, supra*, defendant argues that counsel erred by accepting the woman's assertion of privilege without requesting an evidentiary hearing to determine the scope and nature of the privilege. *Poma*, however, does not state that an evidentiary hearing should be held to determine the validity of a witness's proposed assertion of the Fifth Amendment privilege. Rather, such a hearing is to be held to determine if the witness "will either *properly or improperly* claim the protection against self-incrimination . . . ." *Id.* at 733 (emphasis added). Recognizing the prejudice that is inherent when a witness asserts the privilege from the witness stand, *Poma* counsels that once the trial judge determines that the witness will assert the privilege, the judge "must not allow [the] . . . witness to be called to the stand." *Id.* Here, there appears to be no question that defendant's acquaintance would have asserted the Fifth Amendment privilege. Thus, a *Poma* hearing is unnecessary, and counsel cannot be faulted for not requesting one.

On a related matter, we reject defendant's assertion that defense counsel should have objected to the prosecution's statement to the court (out of the presence of the jury) that it was planning on refiling charges against the woman.[1] After reviewing the record we are convinced that the prosecution was simply informing the court of the position it was taking regarding her case. There is no evidence that the prosecution was misleading the court, or that the refiling of

[1] The prosecution informed the trial court that the district court dismissed the case against the woman because the prosecution was not ready to proceed when the case was called "at an exam stage," given that all of the witnesses for her trial were present at defendant's trial.

charges was simply a ruse.[2]

Affirmed.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Pat M. Donofrio

[2] Defendant has also not shown that the woman's invocation of the privilege somehow hinged on the existence of pending charges. Rather, the availability of the privilege turns on "the nature of the statement or admission and the exposure which it invites." *Estelle v Smith*, 451 US 454, 462-463, 101 S Ct 1866, 68 L Ed 2d 359 (1981) quoting *In re Gault*, 387 US 1, 49; 87 S Ct 1428; 18 L Ed 2d 527 (1967).